EON Bank Bhd & Anor v Tay Guan Hui & Ors

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 24–31 OF 1996
CLEMENT SKINNER J
16 FEBRUARY 2001

Land Law *— Sale of Land — Bare trust — Sale by public auction pursuant to an order for sale — Balance of, proceeds of sale — Whether the six defendants were holding the land as bare trustees for the intervener — Whether the contractual events giving rise to the six defendants becoming bare trustees has occured*

The first to the sixth defendants ('the six defendants') were the registered owner of Lots 426 and 427. They entered into an agreement with a developer to develop the lands on a 'barter basis'. To facilitate the development of the land the six defendants agreed to charge the lands to the plaintiffs as security for loans obtained by the developer. The developer entered into a sale and purchase agreement with one Toh Siu Nieng ('Toh') whereby Toh agreed to purchase Lots 426 and 427 for RM100,000 each. Toh paid RM92,000 in respect of each lot with the balance being payable on execution of the memorandum of transfer in respect thereof. The developer then resold Lots 426 to the seventh and eight defendants ('Wongs') for RM132,000 of which they paid the developer a sum of RM76,000 as a deposit with the balance payable upon execution of a registered memorandum of transfer. The developer was subsequently adjudicated a bankrupt. The official assignee, upon receipt from the six defendants disclaimed the development agreement by virtue of s 59(1) of the Bankruptcy Act 1967. Following the disclaimer, the six defendants entered into a settlement agreement with the plaintiffs. In the event that transpired, the plaintiffs took steps to enforce their rights under the settlement agreement. The plaintiffs, enforcing their statutory remedy of sale under s 148 of the Sarawak Land Code ('the Code') obtained an order to sell the lands. The plaintiffs successfully sold Lots 426 and 427 by public auction. After making payment to the plaintiffs of the amount owed to them, a sum of RM52,864.06 remained in court. The Wongs and Toh intervened in the proceedings to lay claim to this sum. It was the case of the interveners that the balance of the proceeds of sale should be rightfully paid to them on the ground that at the date of the sale by public auction of Lots 426 and 427, they were the beneficial owners of the lots which the six defendants were holding as bare trustees on their behalf.

Held, dismissing the application:

(1) The sale of the two lots having been obtained by the plaintiffs to enforce their statutory remedy of sale under s 148 of the Code, it is the provisions of the Code that will determine how the proceeds of sale were to be dealt with. The order for sale having been obtained in these proceedings, the court found that the interveners had acted correctly when they intervened here and

filed the application. The provisions of O 51A of the Rules of the High Court 1980 were not applicable in the present case because Lots 426 and 427 were sold by way of execution proceedings (see pp 381H, 382B).

(2) The court found that the parties had, by the contract they had made for themselves, clearly stipulated the contractual events which would result in completion of the agreement entered into, at which point in time the six defendants would become bare trustees of the sublots for the developer. The contractual events giving rise to that position had not taken place. The developer had neither fulfilled all his obligations to the six defendants under cl 20 of the development agreement nor had the six defendants given to the developer a duly executed, valid and registrable transfer for the two lots. Therefore, when the developer sold Lots 426 and 427 to Toh and resold Lot 426 to the Wongs, he was not the beneficial owner of the two lots as the contractual events which would have resulted in the six defendants becoming bare trustees of Lots 426 and 427 had not yet occured (see pp 385H–I, 386E, 387D–E).

(3) Not being the beneficial owner of the two lots, the developer could not pass to the interveners a better interest in the said lots than he held and that position had not changed at the date the developer became bankrupt. Whatever contractual rights the developer might have had in respect of the two lots were extinguished when the official assignee disclaimed the development agreement with the result that the six defendants had never at any time become bare trustees of the said lots for the developer or the interveners (see p 386F–H).

(4) The fact that the trusteees in bankruptcy of the developer had not disclaimed the sale and purchase agreement entered into between the developer and the interveners did not advance the claim of the interveners against the six defendants because under those agreements, the interveners could only take or receive what rights the developer could legally pass to them and as the court had already indicated earlier, the stage had not been reached where the six defendants had divested thmselves of their interest in the two lots (see p 387E–F).

[Bahasa Malaysia summary

Defendan pertama hingga keenam ('enam defendan tersebut') merupakan tuanpunya berdaftar Lot 426 dan 427. Mereka telah mengikat suatu perjanjian dengan pemaju untuk memajukan tanah-tanah itu berdasarkan 'barter basis'. Bagi memudahkan pemajuan tanah-tanah itu, enam defendan tersebut bersetuju mencagarkan tanah-tanah itu kepada plaintif-plaintif sebagai cagaran untuk pinjaman yang diperolehi oleh pemaju. Pemaju telah mengikat suatu

perjanjian jual beli dengan seorang bernama Toh Siu Nieng ('Toh') yang mana Toh bersetuju membeli Lot 426 dan 427 untuk RM100,000 setiap satu. Toh membayar RM92,000 berhubung dengan setiap lot dengan bakinya harus dibayar atas pelaksanaan memorandum pindah milik yang harus dibayar atas pelaksanaan memorandum pindah milik yang berkaitan. Pemaju kemudiannya menjual Lot 426 semula kepada defendan ketujuh dan kelapan ('saudara Wong') untuk RM132,000 yang mana mereka membayar pemaju jumlah sebanyak RM76,000 sebagai deposit dengan bakinya harus dibayar atas pelaksanaan memorandum pindah milik boleh didaftar. Pemaju kemudiannya diisytiharkan muflis. Pegawai pemegang harta, atas permintaan enam defendan tersebut menafikan perjanjian penyelesaian disebabkan s 59(1) Akta Kebankrapan 1967. Berikutan kenyataan penafian tersebut, enam defendan tersebut mengikat suatu perjanjian penyelesaian dengan plaintif-plaintif. Dalam peristiwa berikutnya, plaintif-plaintif mengambil langkah untuk menguatkuasakan hak-hak mereka di bawah perjanjian penyelesaian. Plaintif-plaintif, sebagai menguatkuasakan remedi jualan berkanun di bawah s 148 Kanun Tanah Sarawak ('Kanun tersebut') telah memperolehi satu perintah untuk menjual tanah tersebut. Plaintif-plaintif berjaya menjual Lot 426 dan 427 melalui lelong awam. Setelah membayar plaintif-plaintif jumlah yang harus dibayar kepada mereka, jumlah sebanyak RM52,864.06 masih di tangan mahkamah. Saudara Wong dan Toh mencelah dalam prosiding untuk menuntut jumlah ini. Adalah merupakan kes pencelah bahawa baki hasil jualan harus dibayar kepada mereka berdasarkan alasan bahawa pada tarikh jualan Lot 426 dan 427 melalui lelong awam, mereka merupakan tuanpunya lot-lot yang dipegang oleh enam defendan tersebut sebagai 'bare trustees' bagi pihak mereka.

Diputuskan, menolak permohon tersebut :

(1) Setelah jualan kedua-dua lot diperolehi oleh plaintif-plaintif bagi menguatkuasakan remedi jual berkanun di bawah s 148 Kanun tersebut, peruntukan Kanun tersebut akan menentukan bagaimana hasil jualan akan diuruskan. Memandangkan perintah jual telah diperolehi dalam prosiding ini, mahkamah mendapati bahawa pencelah telah bertindak dengan betul apabila mereka mencelah di sini dan memfailkan permohonan-permohonan ini. Peruntukan-peruntukan A 51A Kaedah-Kaedah Mahkamah Tinggi 1980 tidak terpakai dalam kes ini kerana Lot 426 dan 427 tidak dijual melalui prosiding pelaksanaan (lihat ms 381H, 382B).

(2) Mahkamah mendapati bahawa pihak-pihak terlibat telah, melalui kontrak mereka telah membuat untuk diri sendiri, jelas menyatakan peristiwa kontraktual yang akan mengakibatkan penyempurnaan perjanjian yang diikat, pada masa mana enam

defendan tersebut akan menjadi 'bare trustees' lot kecil bagi pihak pemaju. Peristiwa kontraktual yang membangkitkan keadaan ini belum berlaku. Pemaju tidak memenuhi segala kewajipannya kepada enam defendan tersebut di bawah fasal 20 perjanjian pemajuan dan enam defendan tersebut tidak pun memberikan pemaju pindahmilik yang dilaksanakan sewajarnya, sah dan boleh didaftar untuk dua lot itu. Maka, apabila pemaju menjual Lot-lot 426 dan 427 kepada Toh dan mejual semula Lot 426 kepada saudara Wong, beliau bukan merupakan tuanpunya 'beneficial' dua lot itu kerana peristiwa kontraktual yang akan menyebabkan enam defendan tersebut menjadi 'bare trustee' Lot-lot 426 dan 427 belum lagi berlaku (lihat ms 385H–I, 386E, 387D–E).

(3) Memandangkan mereka bukan tuanpunya benefisial dua lot itu, pemaju tidak boleh menyerahkan kepentingan yang lebih baik kepada pencelah dan kedudukan ini tidak berubah pada tarikh di mana pemaju menjadi muflis. Apa jua pun hak kontraktual yang mungkin terletak dengan pemaju berhubung dengan dua lot itu telah dipadamkan apabila pegawai pemegang harta menolak perjanjian pemajuan dengan keputusan bahawa enam defendan tersebut tidak pernah pada bila-bila masa menjadi 'bare trustees' lot-lot tersebut bagi pihak pemaju atau pencelah-pencelah (lihat ms 386F–H).

(4) Hakikat bahawa pemegang amanah dalam kebankrapan pihak pemaju tidak menafikan jual beli yang diikat di antara pemaju dan pencelah tidak menyokong tuntutan pencelah terhadap enam defendan tersebut kerana di bawah perjanjian-perjanjian tersebut, pencelah cuma boleh ambil atau menerima hak-hak yang boleh diberikan kepada mereka secara sah oleh pemaju dan seperti yang dijelaskan oleh mahkamah sebelum ini, tahap di mana enam defendan tersebut telah melucutkan hak mereka daripada kepentingan dalam dua lot itu belum dicapai (lihat ms 387E–F).]

Notes

For cases on bare trust, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2871–2872.

Cases referred to

Ahmad bin Salleh v Rawang Hills Resort Sdn Bhd [1995] 3 MLJ 211 (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Finley, Re; Ex p Clothworkers Co (1888) 21 QBD 475 (refd)

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)

Lysaght v Edwards (1875–76) 2 Ch D 499 (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd) A
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149 (refd)
Su Meu Ging v Philip Yong Khiam Poon & Ors [1988] 3 MLJ 86 (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 (refd) B

Legislation referred to

Bankruptcy Act 1883 [Eng] s 55(2)
Bankruptcy Act 1967 s 59(1), (2), (5), (8)
Rules of the High Court 1980 O 51A, O 83 C
Sarawak Land Code 1958 ss 148, 151
Sarawak Limitation Ordinance (Cap 49) s 3, item 94 of Part IV of the Schedule

David Kuok (*Wong Orlando Chua & Co*) for the first to sixth defendants.
Robin Hii (*Robin Hii & Co*) for the seventh and eighth defendants/ interveners. D
Belinda Hii (*Hii & Hii*) for the ninth intervener.

Clement Skinner J: There are two applications before me. One is made by the seventh and eighth defendants herein ('the Wongs') who, on 17 March 2000, were granted leave to intervene and be added as defendants in these proceedings and the other by one Toh Siu Nieng ('Toh') who, on 5 May 2000, was also granted leave to intervene in these proceedings. E

These applications are being heard together at the request of counsel as both give rise to the same issues for determination. F

These proceedings in which the Wongs and Toh have intervened were commenced by the plaintiffs (both financial institutions) against the first to sixth defendants ('the six defendants') wherein the plaintiffs, enforcing their statutory remedy of sale under s 148 of the Sarawak Land Code 1958 ('the Code'), on 9 September 1996, obtained an order pursuant to O 83 Rules of the High Court 1980 ('RHC'), to sell four parcels of land described as Lots 426, 427, 432 and 435 together with buildings thereon, all in Block 4 Sungai Merah Town District, Sibu, which were charged to the plaintiffs under charge instruments Nos L 1620/82, 2971/82, 2972/82, 2046/84 and 2047/84 to satisfy the sum of RM228,547.25 owing to the plaintiffs with interest thereon at 8.55%pa from 1 March 1996 until date of sale or payment. G H

On 4 March 1999, the plaintiffs successfully sold by public auction Lot 426 for RM143,920 and Lot 427 for RM143,010 respectively (Lot 432 having been redeemed earlier and Lot 435 being withdrawn from sale). After defraying the allowable costs and making payment to the plaintiffs of the amount owed to them, a sum of RM52,864.06 remains in court ('the balance of proceeds of sale'). The Wongs and Toh have intervened in these proceedings to lay claim to this sum. I

A The facts giving rise to the interveners' claims are that Lots 426 and 427 were formerly part of a larger piece of land held under Sibu Occupation Ticket No 35431 which, together with another parcel of land held under Sibu Occupation Ticket No 24012 ('the said lands'), were co-owned by the six defendants and one Sim Chui Peng ('Sim') who has since passed away. On 7 November 1978, the six defendants and Sim entered into an B agreement ('the development agreement') with one Sie Chung Tung ('the developer'), the sole proprietor of a firm known as Sie Chung Tung Housing Development Company, to develop the said lands on a 'barter basis' subject to the terms and conditions contained therein. The general scheme of 'barter' was that the six defendants and Sim would make C available the said lands for development and the developer would, at his entire cost and expense, do all things necessary to build 72 houses on the said lands.

As approval was obtained to subdivide the said lands into only 70 sublots instead of the planned 72, the parties entered into a first supplementary agreement on 18 July 1981 and later a second D supplementary agreement on 2 March 1983. The first supplementary agreement has not been produced as an exhibit by either of the parties hereto but from the second supplementary agreement, it is possible to state that in the first supplementary agreement, the parties agreed to proceed to develop the said lands in two phases, with phase one consisting of 41 E sublots. By the second supplementary agreement, the parties agreed, inter alia, that the 41 sublots were to be allocated in the following manner: 26 sublots to the developer and 15 sublots to the six defendants and Sim. The sublots allocated to the developer included sublots 13 and 14. When individual titles were issued for these sublots, sublot 13 became Lot 426 and sublot 14 became Lot 427. All 41 sublots were apparently comprised in F Sibu Occupation Ticket No 35431.

To facilitate the development of the said lands, the six defendants and Sim agreed to allow the said lands to be charged as security for loans obtained by the developer. By various memoranda of charges registered on 11 May 1982, 3 August 1982 and 9 May 1984 respectively, Sibu G Occupation Ticket No 35431 was charged to the plaintiffs to secure various sums totalling in all RM900,000 lent to the developer.

On 17 May 1983, the developer claiming to be beneficially entitled to sell and dispose of Lots 426 (sublot 13) and 427 (sublot 14), entered into a sale and purchase agreement with Toh, selling to him the said lots together with houses constructed thereon for RM100,000 each. On signing of the H said agreement, Toh paid the developer a sum of RM92,000 in respect of each lot (which was acknowledged in the agreement as having been paid), with the balance of RM8,000 for each lot being payable on execution of the memorandum of transfer in respect thereof. The developer was to complete the said houses by 31 December 1983.

I Almost one year later, on 14 May 1984, the developer resold Lot 426 (sublot 13) to the Wongs for RM132,000, of which, they paid the developer a sum of RM76,000 as a deposit on signing the sale and purchase agreement

with the balance of RM56,000 payable upon execution of a registrable memorandum of transfer in respect of the said lot in favour of them. The Wongs and Toh each claim to have a better title than the other to Lot 426 but for present purposes, have agreed to present a united claim for the balance of the proceeds of sale. If they are successful, they will then address me as to who between them is better entitled to the money.

Returning to the narrative, towards the end of 1987, things took a turn for the worse for the developer. On 12 October 1987, he was adjudicated a bankrupt by the High Court in Kuching. At that date, the developer still owed large sums of money to the plaintiffs. To prevent the plaintiffs from taking steps to recover their debts by enforcing their security over the said lands, the six defendants entered into negotiations with the plaintiffs and came to an understanding with them that if they were willing to accept RM1,596,000 instead of the RM2,419,483.01 due to them as at 31 December 1989, the six defendants would pay or cause to be paid a sum of RM38,000 for each of the 41 sublots to redeem the same from the plaintiffs.

Because the developer had been adjudicated a bankrupt, his rights over the 26 sublots needed to be resolved if the above arrangement with the plaintiffs was to be put into effect. As the property of a bankrupt vests in the official assignee, the six defendants, through their solicitors, wrote to the official assignee on 1 November 1989, apprising him of the developer's rights, interest and obligations in respect of the 26 sublots as well as the arrangement that had been worked out with the plaintiffs for the redemption of all 41 sublots. The official assignee, as the trustee in bankruptcy of the developer, was requested to consider disclaiming interest in the 26 sublots allocated to the developer. On 9 November 1989, the official assignee, in exercise of the authority vested in him by s 59(1) of the Bankruptcy Act 1967, by notice disclaimed the development agreement, the first supplementary agreement and the second supplementary agreement entered into between the developer and the six defendants and Sim.

Following such disclaimer, the six defendants entered into an agreement with the plaintiffs on 12 March 1990 ('the settlement agreements') wherein they agreed, inter alia, to arrange for all 41 sublots to be redeemed from the plaintiffs by the payment of RM38,000 in respect of each lot on or before 30 June 1990 failing which the plaintiffs were at liberty to commence foreclosure proceedings against the said lots.

In the events that transpired, the plaintiffs took steps to enforce their rights under the settlement agreement. Hence, these proceedings and the sale of Lots 426 and 427 with the balance of the proceeds of sale being in court.

It is the case of the interveners that the balance of the proceeds of sale should be rightfully paid to them for the following reasons at the date of the sale by public auction of Lots 426 and 427, they were the beneficial owners of these lots which the six defendants were holding as bare trustees on their behalf.

A The six defendants oppose the claims of the interveners on several grounds. They submitted that the interveners are not bona fide purchasers of Lots 426 and 427, in that, they had knowingly bought these two lots from the developer in breach of cl 9 of the development agreement and cl 4 of the second supplementary agreement. Accordingly, the interveners are estopped from making a claim for the proceeds of sale.

B Clause 9 of the development agreement states that all sale of houses on the said lands will be valid only if notice thereof has been given to the six defendants and Sim and all agreements pertaining to such sale are prepared and executed at the offices of the legal firms identified therein. Clause 4 of the second supplementary agreement states that, all memoranda of transfers C in respect of the sublots of the said lands shall be prepared and executed at the offices of the law firm appointed by the six defendants and Sim for that purpose.

On the affidavit evidence before the court, there is nothing to suggest that when the interveners entered into the sale and purchase agreements with the developer, they knew about cl 9 of the development agreement and D cl 4 of the second supplementary agreement. During submissions, I enquired from counsel for the six defendants if information about cll 9 and 4 would have been available to the interveners when they entered into the sale and purchase agreements with the developer. Counsel for the six defendants replied 'no' but went on to say that they would have known E subsequently. However, counsel for the six defendants did not say when or how they would have acquired such knowledge and neither is the assertion of counsel borne out by the affidavits. I accordingly find no substance in this ground of objection. A case has not been made out whether in law or on the facts from which it can be said that the interveners are now estopped from making this claim.

F It was next said that the interveners' applications herein are procedurally flawed. According to counsel for the six defendants, the interveners should have applied for a rateable distribution of the proceeds of sale under O 51A of the RHC instead of filing these applications. Their failure to do so was fatal and their applications should be dismissed on this G ground alone. I regret, I must reject this objection. The procedure under O 51A of the RHC is appropriate where there has been a sale in execution of an order or judgment and more than one person has prior to the sale attached the property, in which event, those persons who had attached the property may apply for rateable distribution of any surplus from the sale. In our case, the provisions of O 51A of the RHC can have no application as H Lots 426 and 427 were not sold by way of execution proceedings.

In my judgment, the sale of these two lots having been obtained by the plaintiffs to enforce their statutory remedy of sale under s 148 of the Code, it is the provisions of the Code that will determine how the proceeds of sale are to be dealt with.

I Section 151 of the Code provides as follows:

> Purchase money arising from any sale under s 150 shall be applied in the order following —

(a) in payment of any rents, taxes, rates and other fees due to the Government; A

(b) in payment of the expenses and costs of, and incidental to, the notices, summonses and sale;

(c) in payment of the moneys which may then be due or owing to the chargee;

(d) in payment of subsequent charges, if any, in order of their priority and the surplus, if any, shall be paid to the chargor. B

The order for sale having been obtained in these proceedings, I find that the interveners had acted correctly when they intervened here and filed these applications . C

Now, s 151 of the Code requires any surplus to be paid to 'the chargor'. The chargors of these two lots were the six defendants and Sim but it is the interveners' case that whilst the six defendants and Sim may have been the chargors, yet in law, they are to be regarded as having held these two lots as bare trustees for the benefit of the interveners. It is to the competing contentions of the parties on this issue that I must now direct my D attention.

For the Wongs, it was contended that upon their execution of the sale and purchase agreement with the developer and the payment of RM76,000 by way of deposit/part payment to him, they had become the beneficial owners of Lot 426 even though the full purchase price had not been paid. E In support of this contention, counsel for the Wongs referred to the following passage in the judgment of Suffian FJ in *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149 at p 151 where his Lordship said:

> In my judgment, the company becomes in equity a trustee for the plaintiff as soon as the purchase price has been paid. F

Learned counsel for the Wongs also relied on *Ahmad bin Salleh v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211, where, according to counsel, it was held, inter alia, by the High Court that the beneficial ownership in land passes to the purchaser after a sale and purchase agreement has been entered into although the balance of the purchase price is not fully paid. G Counsel for the Wongs went on to submit that they do not need to pay the balance of the purchase price now because the said lot had been sold by order of the court.

Learned counsel for Toh associated herself fully with the above submissions and went on to say that as the developer had completed all the H houses that were allocated to the six defendants and Sim and had also performed and fulfilled all his obligations under the development agreement, the developer became entitled to his share of houses under the development agreement (which included Lots 426 and 427) and to sell them to the interveners who had become the beneficial owners thereof, whereas, the six defendants and Sim, having obtained what they had I bargained for under the development agreement, had become bare trustees holding Lots 426 and 427 for the benefit of the interveners. In support of

this contention, counsel referred to the case of *Su Meu Ging v Philip Yong Khiam Poon & Ors* [1988] 3 MLJ 86.

The six defendants take an opposite view. They say that the interveners' claims, premised on the bare trustee concept, are bound to fail for two reasons: (a) the developer had not fulfilled all his obligations under the development agreement and the second supplementary agreement by reason whereof it could not be said that the six defendants and Sim had become bare trustees, holding Lots 426 and 427 for the developer or his nominees; and (b) after the developer had been adjudicated bankrupt, whatever rights and interest he may have had in the 26 sublots were disclaimed by the official assignee as his trustee in bankruptcy, with the result that any claim the interveners might have had to Lots 426 and 427 become defeated.

In reply to the submission that their rights to Lots 426 and 427 had become defeated by the disclaimer, the interveners argued that the disclaimer did not affect their rights to Lots 426 and 427 because by that date, the six defendants had already become the bare trustees of those lots for the interveners to whom the beneficial ownership had passed when the developer sold them to the interveners. According to the interveners, despite the disclaimer, their position as beneficial owners of the lots remained intact vis-a-vis the six defendants by virtue of the protection afforded to persons such as them by the words I indicate in highlight in s 59(2) of the Bankruptcy Act 1967 which reads:

> The disclaimer shall operate to determine as from the date of disclaimer the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and, shall also discharge the Official Assignee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, *but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the Official Assignee from liability. affect the rights or liabilities of any other person.* (Emphasis added.)

Having set out the competing contentions of the parties on this issue, it is evident to me that the decision in this case will turn upon the answer to one crucial question. When does the vendor/owner of land become a bare trustee for the purchaser in Malaysia?

To answer that question, the interveners rely on the decisions in those cases I had earlier mentioned. However, I find that the law relating to the concept of the bare trustee in a vendor/purchaser situation in Malaysia has been authoritatively stated by the Federal Court in the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12.

Although the facts of that case are different from ours, I find the principles of law stated there very to the issues at hand because one of the central issues raised in that case revolved around the question of whether or not a developer, who had sold a plot of land (with industrial building) to a purchaser, and had been paid the full purchase price by the purchaser, but had not given a duly executed, valid and registrable transfer of the said land

to the purchaser, nevertheless constituted itself a bare trustee of the said land for the purchaser when the purchaser completed the sale by paying the full purchase price.

In resolving that question, the Federal Court took a closer look at the bare trustee concept, which is a peculiarity of English land law, expounded by Jessel MR in *Lysaght v Edwards* (1875–76) 2 Ch D 499 at p 506, and which, as observed by the Federal Court, had been imported into Malaysia and applied by our courts without discussion as to its appropriateness under the Malaysian Torrens Sytem or having regard to the provisions of s 6 of the Civil Law Act 1956. The concept of the bare trustee as enunciated by Jessel MR in *Lysaght v Edwards* was stated thus by him:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

It will be seen from the above that under the English concept, the moment you have a valid contract of sale, the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser. That is the concept now relied on and being advanced in arguments here by the interveners.

After referring to several cases in which the bare trustee concept had been applied in Malaysia, the Federal Court in the *Borneo Housing Mortgage* case concluded that the concept was here to stay but in so far as the crucial question of when a bare trust will arise is concerned, the Federal Court said that the concept would require to be applied in a modified form. This is what his Lordship Edgar Joseph Jr FCJ (as he then was), speaking for the Federal Court said (at p 28):

> In our view, therefore, it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia, though there is high authority to show that the concept, as enunciated by Jesel MR in *Lysaght v Edwards*, would require to be applied in a modified form, so far as the question when the bare trust will arise is concerned ...

With reference to the specific question as to when the vendor of land become a bare trustee for the purchaser in Malaysia, his Lordship pointed out that the old Federal Court had not answered that question uniformly, and as an example of this lack of uniformity referred to the decisions of the old *Federal Court in Peninsular Land Development Sdn Bhd v VK Ahmad* where Suffian FJ (as he then was) said the beneficial ownership passes to the purchaser as soon as the purchase price has been paid, to *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, where Ong Hock Sim FJ said the vendor becomes a bare trustee after receipt of the full purchase price and surrenders possession of the lands; to *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 where

Gill FJ said that the vendor become constructively a trustee for the purchaser only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land; and to *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 where the Federal Court held that a bare trustee position is reached only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

After referring to the above cases, his Lordship Edgar Joseph Jr FCJ then answered the specific question in this way (at p 29):

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subect matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

I should also point out that the Federal Court in the *Borneo Housing Mortgage* case took the opportunity to overrule the decision in the case of *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* which the interveners here placed heavy reliance on in arguing their applications. This is what his Lordship Edgar Joseph Jr FCJ said (at p 29):

> In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

Reverting to the issue at hand and keeping in mind the clear pronouncement of the Federal Court in the *Borneo Housing Mortgage* case about when a vendor of land becomes a bare trustee of the purchaser, can it be said by the interveners in our case that the contractual events which result in completion under the agreements entered into between the six defendants, Sim and the developer had taken place so as to constitute the six defendants and Sim as bare trustees of the 26 sublots allocated to the developer? To me that question must be answered in the negative and I say so for the following reasons.

Firstly, with reference to the question whether there had been payment of the full purchase price, I accept that in the context of the 'barter' or sharing arrangement entered into between the six defendants, Sim and the developer, there was no 'purchase price' payable by the developer. However, I find that the parties had, by the contract they had made for themselves, clearly stipulated the contractual events which would result in completion of the agreement entered into, at which point in time the six defendants and Sim would become bare trustees of the 26 sublots for the developer. In this regard, cl 20 of the development agreement and cl 3 of

the second supplementary agreement are relevant. By cl 20 of the development agreement, the six defendants and Sim agreed to transfer to the developer or his nominees all the 26 sublots allocated to him on the happening of three events:

(i) the completion of all the houses allocated to the six defendants and Sim;

(ii) settlement of compensation for late completion (if any); and

(iii) settlement of the bank loan account.

By cl 3 of the second supplementary agreement, the developer warranted that he would completely discharge and lift caveats on all the sublots allocated to the six defendants and Sim before the 26 sublots allocated to him could be transferred to him. I do not think there is any dispute between the parties that all the houses allocated to the six defendants and Sim had been fully completed but there is clear evidence that when the developer became bankrupt, he still owed large sums of money to the plaintiffs and all 41 sublots remained charged to the plaintiffs. The developer had therefore not performed his obligations under cl 20 and cl 3 of the aforementioned agreements, namely, to settle the bank loan and discharge the 26 sublots, so as to enable completion to take place.

Secondly, it has never been alleged, let alone established in evidence, that the six defendants and Sim had given to the developer duly executed, valid and registrable transfers in respect of the two lots.

Thirdly, it follows from what I have said above that when the developer sold Lots 426 and 427 to Toh on 17 May 1983 and resold Lot 426 to the Wongs on 14 May 1984, he was not the beneficial owner of the two lots as the contractual events which would have resulted in the six defendants and Sim becoming bare trustees of Lots 426 and 427 had not yet occurred. At that stage the developer, the six defendants and Sim were only parties to a contract which the developer might be entitled to seek specific performance of. Not being the beneficial owner of the two lots, the developer could not pass to the interveners a better interest in the said lots than he held and that position had not changed at the date the developer became bankrupt, whereafter whatever contractual rights the developer might have had in respect of the two lots were extinguished when the official assignee disclaimed the development agreement as well as the first and second supplementary agreements entered into with the six defendants and Sim with the result that the six defendants and Sim had never at any time become the bare trustees of the said lots for the developer or the interveners.

In the case of *Re Finley; Ex p Clothworkers Co* (1888) 21 QBD 475, the consequence of a disclaimer by a trustee in bankruptcy was explained by Lindley LJ in the following words when he was considering the provisions of sub-s (2) of s 55 of the English Bankruptcy Act 1883, which is in pari materia with s 59(2) of our Bankruptcy Act 1967:

> The effect of the disclaimer, speaking roughly and generally, is plain enough it is to put an end to both the rights and liabilities of the bankrupt and his

> trustee in respect of the disclaimed property. That is the primary object. By the disclaimer the trustee elects to have nothing to do with the property, which is onerous, and from which nothing can be got for the benefit of the creditors. He is at liberty to disclaim it, and the effect of the disclaimer is to extinguish all the rights and liabilities, both of the bankrupt and the trustee himself. Then the last words show that, notwithstanding that extinction of the rights and liabilities of the bankrupt and the trustee, the rights and liabilities of third persons are to remain untouched.

Referring to the last part of what Lindley LJ said, namely, that notwithstanding such disclaimer, the rights of third persons remain untouched, learned counsel for Toh submitted that the disclaimer was irrelevant to the case because at the date on which the developer became bankrupt, he had already sold the said lots to the interveners to whom the beneficial ownership in the lots had passed by reason whereof the six defendants and Sim had already become bare trustees of Lots 426 and 427, and consequently, the position of third parties, ie the six defendants as bare trustees and Toh as beneficial owner remained untouched. In my opinion, the submission of learned counsel for Toh would have been correct if at the date on which the developer had become bankrupt, the six defendants had already become bare trustees of the two lots for the interveners. But as I have already pointed out earlier, the contractual events giving rise to that position had not taken place. The developer had neither fulfilled all his obligations to the six defendants and Sim under cl 20 of the development agreement and cl 3 of the second supplementary agreement nor had the six defendants and Sim given to the developer a duly executed, valid and registrable transfer for the two lots.

It is also my view that the fact that the trustee in bankruptcy for the developer had not disclaimed the sale and purchase agreements entered into between the developer and the interveners did not advance the claim of the interveners against the six defendants because under those agreements, the nterveners could only take or receive what rights the developer could legally pass to them and as I have already indicated earlier, the stage had not been reached where the six defendants and Sim had divested themselves of their interest in the two lots.

In my view, the interveners' remedy is to proceed either under the provisions of s 59(5) or (8) of the Bankruptcy Act 1967 as they may be advised.

Before concluding, I wish to deal very briefly with an objection raised by counsel for the six defendants regarding limitation, namely, that as the interveners' claim is for compensation for the breach of a contract in writing, it is now barred by limitation under s 3, item 94 of Part IV of the Schedule to the Sarawak Limitation Ordinance (Cap 49) which requires such claims to be made within six years of the breach complained of. I regret that I find no merit in this objection. The interveners are not by their applications making a claim for compensation for the breach of a contract in writing so as to be caught by the above section of the Limitation Ordinance.

For the reasons given above, I dismiss both the applications of the interveners with costs. A

Application dismissed.

Reported by Jafisah Jaafar

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